UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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| WASHINGTON AND NORTHERN IDAHO DISTRICT COUNCIL OF LABORERS (SKANSKA USA BUILDING, INC.),<br><br>and<br><br>SKANSKA USA BUILDING, INC.,<br><br>**and**<br><br>CEMENT MASONS LOCAL 528. | **CASE 19-CD-211263**<br><br>**POST HEARING BRIEF** |

## INTRODUCTION

The instant 10(k) proceeding involves a dispute over the installation of the resinous flooring in the lab areas at the Life Sciences Building at the University of Washington (the "Life Sciences project"). (Board Exhibit, E15). Charged Party Washington and Northern Idaho District Council of Laborers ("Laborers" or "WNIDCL") respectfully requests that the Board award the work to Laborer-represented flooring applicators employed by Leewens Corporation ("Leewens"), the company that Charging Party, Skanska USA Building, Inc. ("Skanska"), has chosen to perform the disputed work, consistent with Skanska's preference that this work be performed by Laborers.

The merits of the dispute are essentially uncontested and lead to the clear conclusion that the disputed work should be assigned to the Laborers. For at least fifteen years, Skanska has primarily employed Laborer-affiliated subcontractors to perform resinous – or colloquially, epoxy – floor coating work. The Laborers have completed scores of projects during this period, to the satisfaction of both Skanska and Leewens. In that time, they have acquired specialized

skills, training, and certification for this kind of work – a necessity due to the intricate and potentially hazardous nature of epoxy floor coating, and the highly specialized training needed to work with the various epoxy products. The Laborers have been performing the epoxy floor coating work on the Life Sciences project from its inception and are nearing completion of their job. Neither Skanska nor Leewens is interested in replacing them. Moreover, the Laborers' collective bargaining agreement with Skanska expressly covers epoxy floor coating and a previous decision by an AFL-CIO-appointed arbitrator recognizes this particular type of floor coating work to be within the Laborers' craft jurisdiction. Conversely, Skanska does not typically engage subcontractors affiliated with Involved Party Cement Masons Local 528 ("Masons") to do epoxy floor coating. As a result, Masons have less experience in this line of work, and none with the particular substance involved on this job. Despite the Masons' periodic efforts to challenge the Laborers' jurisdiction over this work, the Laborers have a long and nearly unbroken track record of performing this work for Skanska, in the employ of Leewens.

It is anticipated that, in an attempt to prevent the Board from making a jurisdictional assignment to the Laborers, the Masons will attempt to characterize what is plainly a jurisdictional claim for new work as a pure subcontracting clause grievance or representational dispute that does not trigger a Section 10(k) dispute. This characterization plainly fails for several reasons. First and foremost, in cases where the Board has distinguished subcontracting clause grievances from jurisdictional claims, both unions involved did not assert entitlement to the work to the same employer – something that did happen here. The employer with whom the Masons have filed their subcontracting grievance is the very same employer caught in the middle of competing claims for work; cases involving a *subcontractor's* work assignment and a grievance filed with a *general* have no applicability. Moreover, controlling Board precedent

holds that a union cannot avoid a jurisdictional dispute by portraying what is in reality a claim for new work as a grievance rooted in contract. The Masons' pay in lieu grievance cannot reasonably be characterized as anything other than a dispute over Skanska's jurisdictional assignment. Furthermore, in a moment of candor, a Masons representative directly acknowledged to Leewens that the union *was* claiming the epoxy floor coating work at the Life Sciences project. The representative's statement to Leewens exposes the Masons' true intent and is more credible than its post-hoc denials. Finally, this case does not involve a representational dispute because the Masons offered no evidence that they sought, or were even interested, in converting Leewens' employees into Masons. Since the Masons' procedural workaround fails, the Board should resolve this jurisdictional dispute and award the work in question to the Laborers.

## STATEMENT OF FACTS

### A. The Laborers Have Performed Epoxy Flooring Work for Skanska for Over 40 Years.

WNIDCL is a labor organization within the meaning of the National Labor Relations Act (the "Act"). (Tr. 10:20-11:6). It is an umbrella organization for several Laborers locals within the Pacific Northwest. (Tr. 93:1-6). Cement Masons Local 528 is also a labor organization under the Act. (Tr. 11:10-16). Skanska is a Delaware corporation and general contractor in the building and construction industry with a place of business in Seattle, Washington. (Tr. 10:2-4, 18:12-14). It is an employer under the Act. (Tr. 10:2-17).

Skanska and the Laborers have a longstanding labor relationship. According to Dale Cannon, the Secretary Treasurer and Business Manager for Laborers Local 242, the Laborers first entered into collective bargaining agreements with Skanska's predecessor in interest, Baugh, in 1977. (Tr. 99:20-25). Don Kowalchuk, Skanska's Vice President of Operations, similarly

testified that Skanska has a historical practice of using Laborers for epoxy floor coating work. (Tr. 23:17-19). The Laborers and Skanska are currently parties to a collective bargaining agreement for 2016-2019. (Employer Exhibit 1). That agreement requires that Skanska award jobs within the Laborers' scope of work only to Laborer-affiliated subcontractors. A number of subcontractors in the Seattle metropolitan area employ Laborers for epoxy floor coating work, including Leewens Corporation, F.D. Thomas, Contech Services, and Mike Quinton (MQI). (Tr. 100:8-24). When one of these subcontractors is awarded a job, if the subcontractor is not already signatory to an agreement with the Laborers, the Laborers execute project labor agreements with that subcontractor for that particular job. (Tr. 93:15-24). Specifically with respect to Leewens, that subcontractor has signed single project agreements with the Laborers as early as 1997. (Tr. 94:16-20; Laborers Exhibit 1). Skanska's records indicate that it has awarded Leewens resinous flooring work since at least as early as 2012. (Employer Exhibit 3; Tr. 63:12-21). For each those projects, Leewens has used only Laborers for the resinous floor coating work. (Tr. 76:10-20).

In January 2016, the University of Washington ("UW") engaged Skanska to construct the Life Sciences building for its biology department. (Tr. 18:6-16, 42:19-20). Pursuant to Washington state regulations for public projects, Skanska solicited bids for the different job assignments to be performed on the project. It is obligated to accept the "lowest qualified bid," meaning the bid from the subcontractor that is appropriately licensed, bonded, insured, and signatory (or willing to become) to a labor agreement with a union with which Skanska is also in privity. (Tr. 19:4-20:7). Skanska solicited bids for the resinous floor coating work through a package detailing the specifications for the project. (Tr. 43:3-17). Leewens was the lowest qualified bidder among four entrants and was therefore awarded the work on or shortly after September 15, 2016. (Tr. 48:1-10, 54:6-12; Employer Exhibit 8). Leewens began work on the

Life Sciences project on approximately September 27, 2016. (Tr. 22:14-18; Employer Exhibit 3 at 1). Leewens-employed Laborers continue to be assigned to the resinous floor coating work and have completed upward of 95% of their part of the project. (Tr. 35:7-13).

**B. Both the Masons and the Laborers Made Claims to Skanska for the Disputed Work.**

The Masons' claim for the resinous floor coating work on the Life Sciences project is an offshoot of its claim for the same type of work on another UW project for which Skanska was serving as general contractor. In 2015, Skanska awarded the subcontractor DPK Inc. the epoxy floor coating work at UW's Animal Research and Care Facility ("ARCF"). (Employer Exhibit 3). DPK, Inc. employed Laborers for the job. (Tr. 26:18-19). Following that award, Eric Coffelt, the Masons' Business Manager, called Kowalchuk claiming the work for the Masons. (Tr. 26:11-25). Kowalchuk did not accede to Coffelt's demands, leading the Masons to file a prevailing wage complaint with the Washington Department of Labor and Industries ("L&I"), the result of which was a finding that that DPK Inc. was paying the Laborers the correct wages. (Tr. 27:1-7).

On April 27, 2017, Coffelt sent Skanska a letter generally claiming various classes of work, including "floor coating," based on certain prevailing wage determinations made by L&I. (Employer Exhibit 4). Then, on July 17, 2017, after reviewing this letter, Skanska officials directed Patrick Leewens, Vice President for Leewens, to contact the Masons to resolve the apparent dispute over the craft assignment to the epoxy floor coating work. (Tr. 68:18-69:5). Leewens phoned Justin Palachuk, a Masons Business Agent, on July 17, 2017. (Employer Exhibit 9). Although the substance of that conversation is disputed, as discussed below, Palachuk clearly informed Leewens that the Masons claimed the floor coating work on the UW Life Science project because L&I had purportedly "assigned" that work to them. (Tr. 58:14-24, 69:22-70:5; Employer Exhibit 11 at 1). After some back and forth, Leewens insisted that it

would continue employing Laborers for the Life Sciences project. (Tr. 60:21-23). The very next day, the Masons filed a subcontracting clause grievance against Skanska based on the ARCF project. (Tr. 27:15-20; Employer Exhibit 12). Subsequently, however, when the Masons' counsel escalated the grievance from Step 1 to Step 2, he incorporated the Life Sciences project as a matter included in the dispute. (Employer Exhibit 5). That grievance remains pending and awaits arbitration. (Tr. 28:24-25, 110:10-16, 120:11-12).

On November 6, 2017, after learning that the Masons were claiming the Life Sciences floor coating work and had filed a grievance in connection with it, Jermaine Smiley, Business Manager and Secretary-Treasurer of WNIDCL, sent Skanska's counsel a letter informing him that "the Laborers are prepared to use all means necessary to ensure that Skanska continues to assign the epoxy work at issue to members of the Laborers Union." (Employer Exhibit 6). On December 11, 2017, Smiley sent a follow-up letter, noting that that "all means necessary" includes "picketing and economic action." (Employer Exhibit 7).

As a result of receiving the competing claims for work, on December 8, 2017, Skanska filed an unfair labor practice claim alleging a violation of Section 8(b)(4)(D). On January 5, 2018, Region 19 issued a Notice of 10(k) hearing. Three days later, on January 8, the Masons sent a letter to Patrick Leewens, purporting to disclaim any intent to claim the epoxy floor coating work on the Life Sciences project. (Masons Exhibit 1). However, the Masons continue to pursue their grievance against Skanska over the UW Life Sciences epoxy floor coating work. (Tr. 120).

## ARGUMENT

### I. THE FACTORS THE BOARD LOOKS TO IN 10(K) DISPUTES FAVOR AN ASSIGNMENT OF WORK TO THE LABORERS.

### A. Overview of the Factors Considered in a 10(k) Dispute[1]

The Board's "determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case." *Newkirk Electric Assoc., Inc.*, 365 NLRB No. 81, *6 (2017). Traditionally, the Board evaluates five core factors to assess the merits of the competing claims. These are:

> (1) Whether the Board has certified both unions as collective bargaining agents and whether both unions have collective bargaining agreements with the employer that cover the work in question;
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> (2) The employer's current assignment, preference, and past practice in assigning the kind of work in question;
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> (3) Area and industry practice in assigning the kind of work in question;
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> (4) Which assignment would best promote economy and efficiency of operation; and
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> (5) Which union has the superior skills and training to perform the work in question.

*See, e.g., Newkirk Electric Assoc., supra*; *Jack Gray Transport, Inc.*, 364 NLRB No. 132 (2016); *Otis Elevator Co.*, 364 NLRB No. 131 (2016); *Standard Drywall, Inc.*, 348 NLRB 1250 (2006). While no single factor is dispositive, "[t]he factor of employer preference is generally entitled to substantial weight." *Henkels & McCoy, Inc.*, 360 NLRB 819, 824 (2014). Some cases call for considering additional factors. For instance, the Board puts stock in arbitration awards concerning "identical work" and "essentially the same parties." *Metal Mgmt. Northeast, Inc.*, 362 NLRB No. 76, at *7 (2015) (finding that "prior jurisdictional determination" in AFL-CIO art. XX proceeding "favors an award" to the union that prevailed in that earlier decision). In this

[1] Preliminarily, it is worth noting that the prerequisites for the Board to proceed with a determination of a dispute pursuant to Section 10(k) of the Act. Here, the Parties stipulated at the hearing that no agreed upon method for voluntarily resolving the dispute exists. (Tr. 13:18-14:2). Other than the Masons' unmeritorious argument that they have not made a claim to the work, there was no evidence calling into question the fact that reasonable cause exists to believe that there are competing claims for the work in dispute and that proscribed means were used. As a result, the Board may reach the merits of the dispute.

case, four of the five core factors favor the Laborers, as does the supplemental "prior award" factor. The one remaining factor is neutral between the Laborers and Masons.

**B. Board Certification and Collective Bargaining Agreements**

This is the lone factor where neither union holds an advantage. Both the Laborers and Masons have executed binding collective bargaining agreements ("CBAs") with Skanska that cover periods from 2016 to 2019. (Employer Exhibits 1 & 2). Both CBAs contain provisions prohibiting Skanska from subcontracting contractually-covered work to entities that are not signatory to an agreement with the respective union. (Employer Exhibit 1 at 9, art. 7, sec. 1; Employer Ex. 2 at 5, art. 6, sec. 1). In addition, both CBAs contain a craft classification that incorporates epoxy work. (Employer Exhibit 1 at 27, Appendix 1, Schedule A, Group III, "Epoxy Technician" Employer Exhibit 2 at 16, Schedule A, Section 2, Group II, "Application of all Epoxy Material").[2] Neither union presented evidence at hearing concerning its Board certification status.[3] Therefore, this factor is in equipoise.

**C. Employer's Current Assignment, Preference, and Past Practice in Assigning Epoxy Flooring Work**

This factor is a tripartite examination of employer-specific considerations. Each sub-factor favors the Laborers. First, as no party disputes, Skanska assigned the Laborers, via Leewens, to install the resinous floor coating at the Life Sciences project. (Tr. 21:6-8). They

[2] Testimony adduced at hearing confirmed that the Laborer's "Epoxy Technician" classification pertains to the resinous flooring coating work on the Life Sciences project. (Tr. 21:9-11, 103:18-24). Although the language in the Masons' contract is similarly phrased, the Masons offered no evidence that any authority in the construction industry interprets this classification to cover the work at issue. Thus, the available extrinsic evidence supports the application of the Laborers' classification over the Masons'.

[3] The Laborers represent that Skanska has recognized them as collective bargaining representatives on a voluntary basis under Section 8(f). The Masons did not offer any evidence of their representation status, be it 8(f) or 9(a). Even if the Masons have been certified as 9(a) representatives, that fact would not influence the outcome of this proceeding. *High Light Elec., Inc.*, 355 NLRB 167, 169, n.8 (2010) (where each union had binding contract with employer but one gained 9(a) status prior to hearing, that change in "representative status has no effect on [Board's] determination of the merits of the dispute" and so factor remained a wash). In any event, the parties stipulated that "the Employer herein is not failing to conform to an order or certification of the board determining the bargaining representative for the employees performing the work in dispute." Tr. 12:16-13:1. Accordingly, the existence of a possible certification is not pertinent to these proceedings, as stipulated by the parties.

have been on the job since approximately September 27, 2016, (Tr. 21:14-18; Employer Exhibit 3), are still working on-site, and have completed about 95% of the project. (Tr. 50:13-14).

Second, Skanska's representatives stated at multiple points during the hearing that they prefer to keep the Laborers as the craft assigned to the Life Sciences project. (Tr. 23:3-8, 50:6-10). Leewens' Vice President, Patrick Leewens, said the same thing. (Tr. 63:22-25). Each company has good reason for its preference. Donald Kowalchuk, Skanska's Vice President of Operations, testified that the Laborers are "the most qualified to complete this project. They've got all the certified installers and we trust that they're going to get the job done for us." (Tr. 23:9-13). Indeed, both Skanska and Leewens have been satisfied with the Laborers' work product over the years. (Tr. 90:6-11). Both Kowalchuk and Lewis Guerrette, a Skanska Project Executive, noted that on a practical level, it makes sense to retain the Laborers to complete the work since the installation was nearly finished. (Tr. 23:10, 50:13-14). On the other hand, replacing the Laborers with the Masons would "disrupt[]" the project schedule because the new flooring applicators would be required, pursuant to "specification requirements," to produce "a mock up" of the resinous coating they would install, which would need to be approved by the architect and UW representatives. (Tr. 50:21-51:3). For his part, Patrick Leewens explained that his company preferred the Laborers because "they've historically performed the work with a good track record and they're trained and certified by the…manufacturer." (Tr. 64:1-4; 74:25-75:3). In addition, he was disinclined to hire Masons because he had once agreed to use them on an epoxy installation project at the Sea-Tac airport garage, but they were unable to provide sufficiently experienced workers and, as a result, produced subpar work. (Tr. 75:4-23).

Third, Skanska has a historical practice of using Laborer-affiliated subcontractors to install epoxy floor coating. (Tr. 23:14-19). A list of all of Skanska's subcontracts for this type

of work between 2010 and 2017 reveals that, of 47 such contracts, all but five were awarded to Laborer-affiliated subcontractors. (Employer Exhibit 3). Similarly, Leewens almost exclusively uses Laborers for epoxy floor coating work (Tr. 89:22-90:2), as shown by the multitude of project labor agreements executive between the two parties between 2007 and 2017 (Laborers Exhibit 1), as well as the aggregate number of hours Laborers have spent on Leewens projects between 2008 and 2017 (Laborers Exhibit 2) (reflecting a grand total of 123,992.75 hours in that span).

In sum, the employer-specific factors weigh heavily in the Laborers' favor. Moreover, the Board should give especial deference to Skanska's preference for Laborers, in light of that sub-factor's importance. *Henkels & McCoy, supra,* 360 NLRB at 824.

**D. Area and Industry Practice**

The uncontroverted evidence adduced at hearing was that, by and large, floor coating subcontractors employ Laborers. Dale Cannon ("Cannon"), Business Agent for Laborers Local 242, provided uncontroverted testimony that Leewens' main regional competitors – DPK Inc., F.D. Thomas, Contech Services, and MQI – also employ Laborers. (Tr. 100:16-24). Leewens' foreman, Larry Vance ("Vance"), testified that he not aware of Seattle-area floor coating companies using any craft but Laborers. (Tr. 89:18-21). Indeed, he had never even seen Masons installing floor coating on a Leewens or Skanska job. (Tr. 89:25-90:5). There is evidence that the Masons, as well as the Painters, have on exceptional occasions performed this kind of work. (Employer Ex. 3; Tr. 49:24-50:1, 75:4-23, 98:22-99:8). But these anecdotal exceptions only prove the rule that the Laborers predominate in the epoxy floor coating industry in the Seattle metropolitan area. This trend is consistent with Skanska's history of assigning epoxy floor coating work to Laborers on more than 90% of its projects. Accordingly, the area and industry practice factor also favors the Laborers.

**E. Economy and Efficiency of Operations**

Without question, economic and efficiency considerations counsel in favor of keeping the Laborers on the Life Sciences project. As noted, replacing Laborers with Masons would require an installation delay so that the Masons could do the redundant work of fabricating a "mock up" – a task the Laborers had already completed and for which they had received approval. (Tr. 50:21-51:3). More generally, it makes little sense to bring in "an entirely different crew" to finish a project that is almost complete. (Tr. 24:3-8). Finally, the Laborers have proven to be a cost-effective source of labor. Subcontractors must factor labor costs into their bid estimates. Leewens was able to win the Life Sciences contract, in part, because its bid incorporated a cost-effective labor structure rooted in its project labor agreement with the Laborers. (Tr. 48:1-8, 50:12; Employer Exhibit 8). Notably, F.D. Thomas, the second lowest bidder, also employs Laborers. (Tr. 48:9-14; Employer Exhibit 8). This factor also weighs in the Laborers' favor.

**F. Skills and Training**

There is overwhelming evidence that the Laborers have superior skills and training in resinous floor coating relative to the Masons. Skanska and Leewens representatives praised the Laborers for their track record of producing high quality epoxy flooring work. *See* Section I.C, *supra*. In contrast, in one of the few instances where Leewens experimented with using Masons, Patrick Leewens was dissatisfied with the results. *Id.* Cannon recalled a second example between 1999 and 2000 when Leewens employed Masons jointly with Laborers on a project at UW's oceanography or fisheries building. (Tr. 98:22-99:17). In that example, "a lot of [the flooring] had to be torn out and replaced." (Tr. 99:13-15).

Applying resinous floor coating correctly requires a high level of technical skill that can be developed only through years of on-the-job training. (Tr. 56:21-23) (Patrick Leewens estimates it takes between three to five years to become fully trained). One cannot walk off the

street and do the job successfully or safely. (Tr. 56:12:14). An applicator must become adept at using several tools at discrete parts of the coating process. These include shot blasters, diamond grinders, caulking tools, steel blades, vacuums, brooms, squeegees, roller covers of different lengths, spike rollers, cove trowels, buckets, and paint brushes. (Tr. 44:4-45:24, 55:14-56:1, 56:6-11, 59:19-20, 83:4-7). The coating process involves multiple steps with little room for error: (1) inspecting the concrete for structural damage or cracking in the substrate (Tr. 82:15-17); (2) exposing a porous substrate of the concrete slab by removing the top sixteenth of the surface with a shot blaster and diamond grinder (Tr. 44:4-13, 82:17-19); (3) clearing the floor of the top layer residue and shot (Tr. 82:19-21); (4) applying a primer to create an initial bond with the porous concrete (Tr. 44:14-15, 82:24-25); (5) mixing, pouring, and rolling multiple layers of epoxy or resin topcoats over the primer (Tr. 44:15-20, 82:25); (6) troweling the coating, mixed with mortar, into wall coves and unleveled spots (Tr. 45:15-24, 46:3-12); and (7) casting acrylic flakes into the resin/epoxy, alternating with rolling finishing layers of floor polisher (Tr. 44:20-45:7, 82:25-83:1).

An applicator must not only become familiar with this sequence, but must also develop techniques to avoid potential pitfalls in its execution. As Vance explained, each kind of floor coating needs to be mixed, poured, and rolled in a particular way because each has a unique cure rate. (Tr. 83:14-84:23, 86:12-21). For instance, mixing involves adding a compound to the coating and then waiting a specific amount of time, based on cure rate, before pouring. (Tr. 83:22-84:1). Then, while rolling, the applicator must maintain a "wet edge"[4] and follow a specific pattern. (Tr. 84:14-19). If one were to roll the coating in a random pattern and ignore the cure rate, transition lines could appear in what is supposed to be a seamless floor. (Tr. 84:19-

[4] Maintaining a "wet edge" means rolling over the freshly poured coating with the roller's front edge only once, while it's still "new material." (Tr. 84:16-19).

23, 86:16-18). In contrast to the extensive record evidence demonstrating the Laborers' ability and skill to perform this kind of work, literally no evidence was introduced pertaining to the Mason's ability to effectively perform this work.

On the Life Sciences project, the resinous coating that the Laborers are working with is methyl methacrylate ("MMA") manufactured by BASF. (Tr. 60:10-14, 83:8-11). MMA has an especially rapid cure rate. (Tr. 83:14-18). In addition to understanding that coating's unique cure rate and rolling process, applicators must be trained to confront the particular safety hazards that MMA presents. (Tr. 86:22-87:1).[5] MMA is a toxic compound that releases vapors into the air, which can potentially cause illness. (Tr. 87:20-88:16). To ensure that these vapors do not contaminate the jobsite or themselves, applicators install a ventilation system designed to "pull[]" the vapors away from them while rolling. (Tr. 88:4-8). Installing this system requires correctly placing fireproof fans and plastic tubes around the jobsite to move the vapors in the desired direction. (Tr. 88:17-22).

Each of the approximately 40 Laborers employed by Leewens and available to perform work for Skanska on the UW Life Sciences project has been trained in the general aspects of floor coating and in installing MMA in particular. (Tr. 85:2-5, 88:23-25). Indeed, Vance has been training his crew since "the day" each member was hired. (Tr. 86:2-6). Of the 40 Laborers at Leewens, approximately 30 have at least 10 years of experience in this kind of work. (Tr. 85:16-86:1). Furthermore, foremen such as Vance receive advanced training and certification in the installation of specific coatings. For instance, before BASF agreed to authorize Leewens to use the MMA it manufactures, it required Leewens' foremen and several vice presidents to go to

[5] All epoxy floor coating work involves respiratory safety issues, which stems from silica in the concrete dust that is released during the work. (Tr. 87:12-19). For this reason, applicators must wear respirators. (Tr. 87:15-16). Each applicator must be approved to wear a respirator, which is custom-fit, and foremen like Vance are individually trained to ensure that each mask is correctly fit to a worker's face. (87:1-11).

its plant to learn how to properly install it, "recognize any problems" one might encounter with the product, and how to fix it. (Tr. 89:3-11). As part of that certification training, BASF required foremen to correctly simulate the application of each layer of MMA coating. (Tr. 89:14-17). Again, in stark contrast, there was no evidence as to whether or not the Masons have any familiarity or experience working with MMA, or even whether they possess the requisite safety certifications. Notably, during his conversation with Patrick Leewens, Masons' Business Agent, Justin Palachuk, admitted that the Masons had never "done work with this exact system." (Tr. 60:7-8). Given MMA's potential hazards and prerequisites for use, it would be extremely dangerous to allow workers who are unfamiliar with this product to install it.

In light of Laborers' track record of success, years of on-the-job training, familiarity and certification with the particular material at issue, the skill and training factor weighs heavily in their favor.

**G. Past Arbitration Award**

The exact type of work at issue here – resinous floor coating – was the subject of a 2003 arbitration decision by the AFL-CIO's Plan for Settlement of Jurisdictional Disputes in the Construction Industry (the "Plan"). (Employer Exhibit 10, hereinafter "*Seattle Public Library*"). Both the Laborers and Leewens were parties to this arbitration. And although the Masons were not a direct party (the challenge was brought by the Painters), the arbitrator noted that the installation of "epoxy resin flooring materials" has been "claimed at various times by the Painters, Laborers, *Cement Masons*, and Bricklayers." (*Id*. at 3) (emphasis added).[6] Thus, the parties are "essentially the same." *Metal Mgmt. Northeast, Inc.*, 362 NLRB No. 76, at *7. The arbitrator in *Seattle Public Library* ultimately awarded the work to the Laborers because "the

[6] Additionally, all trades were invited to claim this work. (*See* Employer Exhibit 11 at 1) (describing circumstances of the arbitration), but no claim was apparently made to the epoxy flooring work by the Masons.

stronger evidence suggests that Leewens typically has hired workers represented by the Laborers in recent years." (*Id*. at 5). Given that the relationship between the Laborers and Leewens was sufficiently longstanding in 2003 to assign work to the former, the unbroken continuation of that relationship weighs heavily in a nearly identical 2018 dispute. Therefore, the award in *Seattle Public Library* further supports assigning the epoxy floor coating work at the UW Life Sciences project to the Laborers.

In sum, the Masons offered absolutely no evidence to controvert the merits on the foregoing factors.[7] Instead, the Masons argue that they are only pursuing a grievance arising from Skanska's alleged violation of a CBA subcontracting clause. (Employer Exhibits 12-18). This is a specious claim.

## II. THIS IS A WORK JURISDICTION DISPUTE, NOT A SUBCONTRACTING OR REPRESENTATIONAL DISPUTE.

### A. The Masons' Pay In Lieu Grievance Amounts to a Claim for the Work.

It is anticipated that, rather than defending on the merits of its claim to the disputed work, the Masons will instead argue that it has not made a claim to the disputed work at all by filing a subcontracting dispute with Skanska. This argument plainly fails for several reasons. When confronted with the assertion of a purported contract enforcement objective, the Board should ascertain "the real nature and origin of the dispute," apart from any obligations contained in the CBA. *SSA Terminal, LLC*, 344 NLRB 1018 (2005) (quoting *USCP-Wesco*, 280 NLRB 818, 820 (1986), *aff'd sub nom*. *USCP-Wesco, Inc. v. N.L.R.B.*, 827 F.2d 581 (9th Cir. 1987)). "[E]ven

[7] Additionally, lest the Masons point to a prevailing wage determination as evidence that they should be assigned the work, as they did in their April 2017 letter to Skanska, Board case law holds consistently that state prevailing wage determinations do not affect "the resolution of jurisdictional disputes over an employer's work assignment," nor does the existence of prevailing wage proceedings in state court deprive the Board of jurisdiction to consider the work assignment question. *Henkels & McCoy, Inc.*, 354 NLRB 556, 558 (2009); *see also Carlson & Co.*, 286 NLRB 698, 700 (1987); *San Diego Zoological Society*, 198 NLRB 129, 130 (1972*); High Light Elec., Inc.*, 355 NLRB 167, n.2 (2010).

though a labor organization seeks an assignment of work based on a contract, this does not detract from the jurisdictional nature of the dispute." *Vibroflotation Foundation Co,* 199 NLRB 453, 455 (1972). Moreover, "[t]he Board has consistently held that jurisdictional demands, in the guise of contract interpretation, are not insulated from the reach of Section 8(b)(4)(D)." *Brown & Williamson Tobacco Corp.*, 143 NLRB 947 (1963).

The key consideration in determining whether an alleged violation of a subcontracting clause is actually a jurisdictional dispute is whether the grieving union is using available contract remedies to merely *preserve* work it has historically performed for an employer or to gain work it has never, or rarely, done before. *Kinder Morgan Terminals*, 357 NLRB 2217, 2219 (2011) ("…when as here a union is claiming work for employees who have not previously performed it, the objective is not work preservation, but work acquisition. The Board will resolve that dispute through a 10(k) proceeding."). In all of the cases where the Board has quashed a notice of 10(k) hearing, it has relied on the fact that the union pursuing a contract claim was merely seeking to recover work it had traditionally performed. *See, e.g.*, *SSA Terminal*, *supra*, at 1020; *USCP-Wesco*, *supra*, at 820; *Safeway Stores*, 134 NLRB 1320, 1321 (1961). Conversely, the Board has held Section 10(k) applicable where the purported contractual dispute concerns work that a rival union traditionally performs. *See, e.g.*, *Kinder Morgan*, *supra* at 2219 (given that employees represented by rival union historically performed this work, "this is not a case about 'work preservation,' because there are no ILWU jobs to preserve"); *Nat'l Constr. Alliance II*, 361 NLRB No. 122, *6 (2014); *Metal Mgmt., supra*, at *4; *KMU Trucking & Excavating, Schirmer Constr. Co.*, 361 NLRB No. 37, *4 (2014) (grievance was jurisdictional in nature where not aimed at preserving work); *Nerone & Sons, Inc.*, 365 NLRB No. 18 (2017) (where "the record shows…consistent assignment of the work to" employees of one union, "and, at most, only

isolated instance of" assignment to employees of second, the latter's claim that it has only contractual dispute with employer will be rejected).

In this case, the evidence establishes that the Laborers – not the Masons – have historically installed epoxy floor coatings for Skanska. (Employer Exhibit 3). As in *Nerone & Sons*, there are only "isolated instances of" Skanska assigning this kind of work to Mason-affiliated subcontractors. (Employer Exhibit 3; Tr. 49:24-50:1, 75:4-23, 98:22-99:8). The Masons are using their contract grievance in an attempt to expand their jurisdiction to new work.

The fact that the Masons have pursued their contract claim through the grievance procedure does not change the underlying rule. Both the Board and federal circuit courts hold that a union's pay-in-lieu grievance does not change the jurisdictional nature of a dispute where "two unions have contracts [with an employer] and each union claims its contract covers the same work." *Swinerton & Walberg*, 298 NLRB 412, 413-14 (1990); *see also Local 30, Tile & Composition Roofers Ass'n v. N.L.R.B.*, 1 F.3d 1419, 1427 (3d Cir. 1993) ("The distinction Local 30 seeks to draw between seeking the work and seeking payment for the work is ephemeral."). In fact, the grievance's filing is affirmative evidence of the jurisdictional dispute. *AMS Constr.*, 356 NLRB 306, 308 (2010) ("Operating Engineers' claim to the disputed work is demonstrated by its filing of two pay-in-lieu grievances with the Employer, each effectively claiming the directional boring work.") (citing *Swinerton & Walberg*, *supra* at 414 & *Local 30*, 1 Fd.3d at 1427). The Third Circuit explained why a pay-in-lieu grievance equates to a claim for work, even if it facially seeks only compensation:

> From a workman's point of view, the valuable part of a right to a particular job is the right to be paid for it. Thus, a jurisdictional dispute between two groups of employees as to which is entitled to certain work is in essence a dispute as to which shall receive compensation for that work. The opportunity sought to perform labor is significant only as a means of obtaining compensation. It follows that if workmen, who are entitled to a job under the terms of a labor

> contract, agree to forego the obligation of working but not the concomitant right to payment, they have not disclaimed any significant right. When, as in this case, one group insists that work, for which another group has contracted and is being paid, be assigned it, the fact that both groups are claiming pay for the same work suffices to create a jurisdictional dispute, and it is irrelevant that either group, or both, may manifest a willingness to take the pay and forego the work.

*N.L.R.B. v. Local 1291, ILWU*, 368 F.2d 107, 110 (3d Cir. 1966). *See also Ballast Construction,* 364 NLRB No. 126 (2016) (subcontracting grievance against a general contractor amounted to a jurisdictional claim for the work).

Here, the Masons are seeking to be compensated for the Laborers' work by virtue of Skanska's purported subcontractor clause violation. (Employer Exhibit 17) (acknowledging that the Masons are "seeking damages based on [Skanska's] improper subcontracting"). The Masons' nominal contractual claim is tantamount to a jurisdictional claim for work. Only a 10(k) proceeding can resolve that kind of dispute.

**B. *Capitol Drilling* Does Not Prevent a Jurisdictional Dispute From Existing Here, Where the Mason's Grievance is Directed at the Same Employer Caught Between Two Conflicting Claims for the Same Work.**

The Masons appear to contend that these precedents do not apply because their grievance is directed at Skanska, a general contractor, rather than Leewens, the subcontractor that directly employs the employees performing the work in dispute. The Masons are wrong. In a letter to Skanska's attorney, counsel for the Masons asserted that "this is a grievance governed by the parties' standard grievance procedure, and does not involve any other groups or individuals not a party to that collective bargaining agreement." (Employer Exhibit 17). The Masons' Counsel cited *Associated General Contractors v. IUOE, Local 701*, 529 F.2d 1395 (9th Cir. 1976), and *Capitol Drilling Supplies*, 318 NLRB 809 (1995), in support of this proposition. (*Id*.). But those cases are inapposite.

*Capitol Drilling* held only that a jurisdictional dispute under 10(k) does not exist where a union (Union 1) that is party to CBA with a general contractor makes a contractual claim against that contractor for using a subcontractor affiliated with a different union (Union 2), while Union 2 threatens *only the subcontractor* with coercive activity if it should reassign the work at issue to Union 1's members. *Id*. at 810. The Board observed that in this scenario, there are really two separable disputes: one between the general contractor and Union 1 and another between the subcontractor and Union 2. *Id*. The facts and holding in *Local 701* were similar. *Local 701*, 529 F.2d at 1397-98 (noting that case *did not* involve the "intractable problems" that exist when a "single employer [is] caught between the conflict demands of two or more unions").

In this case, both the Laborers and the Masons have made their claims to the same entity – Skanska. The Laborers never made a claim for the work to Leewens, the subcontractor, and Leewens is not a party to this proceeding.[8] The parties' conflicting claims to the work were appropriately aimed at Skanska, because it is Skanska, and not Leewens, that ultimately retained the authority to decide to which craft the epoxy work would be assigned.[9]

The Board has expressly recognized that *Capitol Drilling* has no application to claims presented in this posture, where two competing claims are made to the very same employer. *AMS Constr., supra*, at 308, n.7 (*Capitol Drilling* inapposite where "there is no subcontractor involved and both the Laborers and the Operating Engineers have made competing claims to the Employer for the work"); *Michel, Inc.*, 325 NLRB 1058, 1059, n.2 (1998) (same). Because Skanska alone remains caught between the Laborers' and Masons' competing claims, there is a jurisdictional dispute within the meaning of Section 10(k). The fact that the Masons' claim for

[8] As discussed *infra*, the Masons did make a claim for work directly to Leewens, rendering this case distinguishable from *Capitol Drilling* in that respect as well.

[9] Accordingly, Leewens is not a necessary party to this dispute because Skanska has the ultimate power to assign the work at issue. *See* Section IV, *infra*.

the work happened to take the form of a subcontracting grievance, like in *Capitol Drilling*, does not mean that *Capitol Drilling* has any applicability here.

### C. The Masons Also Created a Jurisdictional Dispute by Expressly Claiming the Disputed Work in Communications to Both Skanska and Leewens.

Even if all of the foregoing did not clearly create a jurisdictional dispute, the existence of a jurisdictional dispute cannot be denied in light of the fact that the Masons made direct claims for epoxy flooring work to both Skanska and Leewens.

After the work in dispute was underway, the Masons wrote to Skanska to broadly claim certain categories of work, including the type being performed in the construction of the UW Life Sciences Building. On April 27, 2017, Eric Coffelt, the Masons' Business Manager, wrote a letter to Kowalchuk concerning the Masons "Scope of Work." (Employer Exhibit 4 at 1). Coffelt referenced determinations by Washington's Department of Labor and Industries ("L&I") that certain categories of work required paying prevailing wages at Masons' rates, including "Floor Coatings." (*Id*.). Coffelt stated that "[i]nstallation of the seamless composition flooring system is properly within the scope of work for the cement masons…" (*Id*.). While the Masons attempted at hearing to characterize the letter merely as a caution to pay the correct prevailing rate, and not a claim for work, the plain language of the letter belies that characterization – in closing the letter, Coffelt stated, "[o]ur expectation is that all Project Managers, Project Engineers, Superintendents, Estimators, etc. will understand that this extent of work *is claimed* by Local 528 Cement Masons." (*Id*. at 2) (emphasis added). By claiming epoxy floor coating, the Masons put Skanska on notice that it sought to be assigned prospectively to all projects involving such work, *not* that they wanted retroactive damages for not being so assigned, and not merely that they wanted Skanska to pay certain rates for the epoxy flooring work. Indeed, this is precisely how Skanska understood the letter. (*See* Employer Exhibit 11 at 3) (in reference to

letter attachment, Kowalchuk wrote, "Note this is just a friendly reminder of the work the cement masons *claim*.") (emphasis added). Skanska continues to believe that the Masons' true aim is to claim the work at the Life Science project. (Tr. 37:19-38:7). There is simply no reasonable basis for contending that the Masons have not directly claimed the work with Skanska, even were it not for the existence of its jurisdictional grievance.

The Masons went a step further and also claimed the work directly to the subcontractor performing the work in dispute. When the Masons learned that Skanska assigned the epoxy floor coating work for the Life Science project to Laborer-affiliated subcontractor Leewens, Palachuk informed Patrick Leewens by phone that the Masons claimed the work. Although at the hearing Palachuk denied making this statement (Tr. 106:13-19; Employer Exhibit 9), Patrick Leewens' testimony, as well as the record evidence in the immediate aftermath of their conversation, contradict this account. According to Patrick Leewens, Palachuk claimed that L&I "assigned the work to the Cement Masons." (Tr. 69:25-70:5). He understood by that statement that Palachuk wanted Leewens to sign an agreement with the Masons and use their members for the Life Sciences project. (Tr. 74:21-24). That Palachuk claimed the work, and not merely inquired about its scope, is corroborated by Patrick Leewens' email to Skanska representatives, sent the same day as the phone conversation. In that email, Patrick Leewens stated, unambiguously and consistent with his testimony, that Palachuk "informed me that L+I had assigned the work we (Leewens) are to do under this project to the Masons." (Employer Exhibit 11 at 1). Given Patrick Leewens' understanding of his conversation with Palachuk, he was naturally surprised by the Masons' January 8, 2018 letter, which purported to disclaim interest in claiming the epoxy flooring coating work at the Life Science project. (Tr. 73:15-18). The letter, in Leewens' view, was entirely contrary to Palachuk's prior representations. (Tr. 73:18-21).

Board precedent squarely holds that a union claims entitlement to project work when, in the course of a phone conversation with an employer official, its representative affirms that the work is "their['s]." *US Utility Contractor Co.*, 355 NLRB 344, 346 (2010) (employer official testified that union representative responded affirmatively to question whether "the Employer was required to use 'your people,'" and added, "'[i]t's their work'"); *see also AMS Constr.*, *supra* at 308 (employer and union officials testified that rival union representative made several visits to jobsite and claimed work); *Ballast Constr., Inc.*, *supra*, at *5 (2016) (union business agent told employer president that, by assigning work to another craft, she was "taking jobs at the site away" from his members). In *US Utility*, the Board expressly found it unnecessary to "rule on the credibility of [the official's] testimony in order to proceed to the determination of a 10(k) dispute because the Board need only find reasonable cause to believe that the statute has been violated." *Id*. at 346, n.9 (citing *U.S. Information Sys.*, 326 NLRB 1382, 1383 (1998); *see also AMS Constr.*, *supra* at 308 (same). Here, although there is sufficient support to credit Patrick Leewens' testimony, should the Board decline to do so, there is certainly enough evidence to find the reasonable cause standard met. Since there is reasonable cause to believe Palachuk claimed the epoxy flooring coating work at the Life Science project, the Board should adjudicate the dispute on the merits.

**D. The Dispute is Over Union Jurisdiction, Not the Representation of a Single Group of Employees.**

It is anticipated that the Masons will also argue that, to the extent there is a dispute between them and the Laborers, it relates only to a conflict over representation, not jurisdiction. This argument is unavailing. The Board has indeed held that a jurisdictional dispute does not exist where two unions are at odds only as to "which union will represent the single group of employees currently performing that work." *Lymo Constr. Co.*, 334 NLRB 422, 423 (2001).

But that is not the case here. The Masons have offered no evidence that they sought to convert Leewens' employees from Laborers to Masons. To the contrary, in all of its interactions with Skanska and Leewens, the Masons asserted that the work was "theirs" – i.e., must be performed by the Masons' existing membership. (Employer Exhibit 4; Employer Exhibit 11 at 1; Tr. 69:25-70:5) (all evincing a claim on behalf of the Masons as a group distinct from employees of subcontractors performing work on Skanska projects). Moreover, Patrick Leewens testified that he took Palachuk's statements to mean that "[h]e wanted me to use *his people*…." (Tr. 74:15-24) (emphasis added). *Lymo* has no application where, as here, a union representative asserts to an employer official that the work at issue "belong[s]" to his members. *DNA Contracting, LLC*, 338 NLRB 997, 998, 999 (2003) (distinguishing *Lymo* where union representative told employer official that disputed work "was theirs").

Further, any contention that the Masons were interested in becoming the bargaining representative for Leewens' employees is belied by their pursuit of a subcontractor clause grievance against Skanska. Under the present circumstances, filing a subcontractor clause grievance is, as noted above, merely a surreptitious method of pursuing a jurisdictional claim. Should the Masons prevail at arbitration, the only beneficiaries of the award will be the Masons' current membership, who will presumably receive back pay. Clearly then, the Masons' own actions demonstrate that they seek only to extract benefits for their own members, not conscript new ones.

In sum, the Masons have consistently and at every opportunity made claims for the disputed work – from broadly asserting floor coating work in a letter to Skanska, to claiming the work in a phone call with the subcontractor awarded the epoxy work, to filing and continuing to

prosecute a grievance over the disputed work. There can be no question that a 10(k) award is warranted and necessary to resolve the jurisdictional dispute in these circumstances.

## III. THE MASONS' PURPORTED DISCLAIMER DID NOT RESOLVE THE JURISDICTIONAL DISPUTE AND A 10(K) AWARD REMAINS NECESSARY.

A disclaimer must be "clear, unambiguous, and unequivocal." *Mercury Tile Co.,* 221 NLRB 411 (1975). "Because, at its core, a jurisdictional dispute is a dispute over who shall be paid for particular work, a disclaimer of the 'work' that does not also equate to a disclaimer of the pay fails to extinguish the dispute when the disclaiming union continues to perform the work." *Austin Co.*, 296 NLRB 938, 939-40 (1989) (citing *Local 1291*, 368 F.2d at 110).

The Masons may point toward the January 8, 2018 letter, Masons Ex. 1, as evidence that any claim made to the work has been disclaimed. But this argument fails in light of the fact that the Masons' behavior since that date that is inconsistent with the purported disclaimer. In particular, the Masons continue to pursue the same jurisdictional grievance that constitutes their claim to the work. (Tr. 120:11-12). Nothing about the Masons' behavior since the disclaimer would give Skanska any assurance that this jurisdictional dispute will not persist. *See Util. Serv. Corp.*, 172 NLRB 1877, 1878 (1968) ("even in view of counsel's apparent disclaimer, there is no sufficient assurance [against] further work interruption"). A disclaimer that does not involve any sacrifice, hardship, or compromise in position by the disclaiming party is not an effective disclaimer. *See e.g. Landau Outdoor Sign Co.,* 225 NLRB 320 (1976). Here, the Masons have in no way changed their position and continue to pursue their grievance with Skanska. Moreover, disclaimers made for the first time after a notice of a 10(k) hearing is issued, like the one here, suggests that it is not a true disclaimer but instead a "hollow disclaimer for the purpose of avoiding an authoritative decision on the merits." *Brockway Glass Co., Inc.*, 226 NLRB 142, 143 (1976). Finally, the fact that Skanska was not assured that the Masons' purported disclaimer

would resolve the jurisdictional dispute further points toward the disclaimer's ineffectiveness. (Tr. 37, 120) (Kowalchuk, testifying that he believes the Masons are still claiming the work). *See Great Atlantic & Pacific Tea Co.*, 207 NLRB 1065, 1066 (N.L.R.B. 1973) (whether employer is satisfied with disclaimer is pertinent factor in determining whether disclaimer resolved dispute).

## IV. SKANSKA RETAINED AUTHORITY TO AWARD THE WORK IN DISPUTE AND IS PROPERLY CONSIDERED THE ASSIGNING EMPLOYER.

It is finally anticipated that the Masons may claim that because Leewens is the direct employer of the employees in questions, that Leewens, and not Skanska, is the assigning employer, and that only Leewens, and not Skanska, could be caught in the middle of a jurisdictional dispute over the work in question. Such a position would be mistaken. Board authority makes clear that a 10(k) award is appropriate even where the competing claims were made to an entity *other than* the direct employer. The key inquiry is whether the charging party has the authority to assign the work. *See Apple Restoration and Waterproofing*, 313 NLRB 1111, 1113 (1994) (10(k) appropriate even though the charging party was not the direct employer of the employees performing the disputed work where the object of the prohibited conduct was to cause the charging party to make a particular assignment). In *Structure Tone*, 352 NLRB 635 (2008), the Board explained the appropriateness of using a 10(k) proceeding to resolve a work dispute where the charging party was not the direct employer but nonetheless retained the authority to make the disputed work assignment:

> This case is atypical because Local 825 directed its picketing at the Employer rather than Market Halsey, the party that employs the operator who currently performs the work in dispute. This case nevertheless presents a situation which Section 8(b)(4)(D) was intended to remedy. As the Board noted in *Plumbers Local 195 (Gulf Oil)*:
>
> > Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to engage in proscribed activity with an object of "forcing or

> requiring *any employer* to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class." The Board has interpreted this language as showing the "clear intent of Congress to protect not only employers whose work is in dispute from such [proscribed] activity, but *any* employer against whom a union acts with such a purpose."
>
> 275 NLRB 484, 485 (1985) (emphasis in original; footnote omitted) quoting *Cargo Handlers*, 236 NLRB 1439, 1440 (1978)).

*See also Elec. Workers, Local 439*, 195 NLRB 976, 977 (1972) (general contractor, the charging party in a 10(k) proceeding, never contemplated losing control over the work assignment to the subcontractor, and was properly considered "the employer" for work assignment purposes); *J. A. Jones Constr. Co.*, 181 NLRB 1092, 1093 (1970) (general contractor and charging party was properly considered as "the employer" in a 10(k) proceeding where its award to subcontractor was dependent on the subcontractor following its labor relations policies); *Rust Eng'g Co.*, 169 NLRB 1026, 1028 (1968) (general contractor was "employer" for 10(k) purposes despite fact that subcontractor was the direct employer of employees performing the disputed work where it actually exercised control over work assignment by interceding and reassigning certain work and subcontractor did not object); *ICTSI Oregon, Inc.*, 358 NLRB 903, 905 (2012) (rejecting union's claim that there was no violation of Section 8(b)(4)(D) when rival union picketed shipping company that had power to control reassignment, rather than Port of Portland, which was the nominal employer for the work at issue).

In this case, it is undisputed that Skanska retained control over the work assignment made by Leewens. At the hearing, Kowalchuk affirmed that Skanska has the authority to direct a subcontractor awarded a given assignment to source its labor from only that craft with which Skanska is party to a labor agreement that covers the class of work corresponding to the assignment. (Tr. 20:2-9, 42:2-5, 50:2-5). Indeed, Skanska exercised this power on the Life

Science project in connection with an assignment not at issue here. (Tr. 20:12-21:2) (Kowalchuk explained that it directed specialty Belgian contractor assigned to build Life Science greenhouse to enter into one-time agreement with Ironworkers, with whom Skanska had CBA, and after contractor was unable to do so, it removed that contractor from the project and assigned the work directly to the Ironworkers). As noted at the outset, both the Laborers and Masons are signatory to labor agreements with Skanska that cover the work in dispute. Accordingly, Skanska has the authority to direct Leewens to use employees of one union or the other for the epoxy floor coating work on the Life Sciences project. Because Skanska, not Leewens, is the entity with the ultimate authority to direct which craft performs this work, it is the appropriate "employer" within the meaning of Section 10(k).[10]

## CONCLUSION

For all the above-stated reasons, the Board should issue an order awarding the epoxy floor coating work at the UW Life Sciences Building to the Laborers. The evidence adduced at hearing makes clear that there are competing claims for the epoxy floor coating work on Skanska's UW Life Sciences project. That the Masons have claimed the work via a pay in lieu grievance with Skanska does not convert what is fundamentally a jurisdictional dispute into a mere contractual grievance. Likewise, the Masons' purported disclaimer does not have any material effect on the case where they continue to pursue their claim for the work. At the end of the day, Skanska remains in the in the untenable position of facing two competing claims for the epoxy floor coating work. The undisputed evidence makes clear that the 10(k) factors favor an award to the Laborers rather than the Masons.

[10] Even if Skanska did not have this power, there is no dispute that the Laborers treated Skanska as if it did by addressing its picketing threats to that company. As *Gulf Oil* and its progeny establish, a 10(k) dispute exists whenever "any employer" receives communications with this content. *Gulf Oil*, *supra* 275 NLRB at 485.

Respectfully submitted this 4th day of April, 2018.

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**AFFIDAVIT OF SERVICE**

I, Esmeralda Valenzuela, hereby declare under penalty of perjury under the laws of the state of Washington that on April 4, 2018 I caused the foregoing document, ***WNIDCL'S Post-hearing Brief***, to be filed with the National Labor Relations Board via the online filing system, and a true and correct copy of the same to be sent via e-mail and U.S. First Class Mail to:

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